OCT 3 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 415

JAMES GASTON,
Petitioner,
JOSEPH ROBINSON,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTICT OF COLUMBIA CIRCUIT

T. EMMETT MCKENZIE,
412 Fifth Street, N.W.
Washington 1, D. C.
Counsel for Petitioners

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

INDEX

PAGE

OPINIONS BELOW 2

JURISDICTION 2

QUESTIONS PRESENTED 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2-4

STATEMENT OF THE CASE 4-22

REASONS FOR ALLOWING OF WRIT 23-30

CONCLUSION 31

CITATIONS

Aldridge v *United States,* 283 U.S. 308, 51 S. Ct. 470, 75 L. ed. 1054, 1057 ..... 29, 30

Bailey v *United States,* 53 F 2d. 982, 983, 984—C.C.A. 5; 1931 ..... 25, 26

Baker v *Hudspeth,* 129 F 2d. 779, 782 27

Delaney v *United States,* C.C.A. 1, 1952, 199 F 2d. 107, 111, 113 ..... 17, 18

Reynolds v *United States,* 98 U.S. 145, 154, 155, 25 L. ed. 245 ..... 30, 31

State v *Pickett,* 73 N.W. 346, 347, Supr. Ct. Iowa, 1897 29

Turner v *State,* 157 S.W., 67, 68, 128 Tenn. 27 Ann. Cas. 1914D. 693 23-25

United States v *Chapman,* 188 F 2d, 417, 419—C.C.A. 10; 1947 ..... 26, 27

United States v *Wood,* 299 U.S. 123, 57 S. Ct. 177, 181, L. ed. 78, 81, 82 ..... 27, 28

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To the Honorable Chief Judge and Associate Judges of the Supreme Court:

The petitioners, addressing themselves to the Court through their counsel, T. Emmett McKenzie, of Washington, D.C., pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit, entered on June 18, 1958; and

Of the decision of the United States Court of Appeals for the District of Columbia Circuit, entered on September 4, 1958, denying a rehearing in the matter.

OPINIONS BELOW

The judgment of the Circuit Court of Appeals of June 18, 1958, has not been printed. Copy is set forth, infra.

The Order of September 4, 1958, has not been printed. Copy is set forth, infra.

JURISDICTIONAL STATEMENT

The judgment of the Court Below, affirming the judgment of the District Court of the United States for the District of Columbia bears date of June 18, 1958.

The judgment of the Court below denying appellants' petition for rehearing bears date of September 4, 1958.

The jurisdiction of this Court is invoked under 28 U.S.C. section 1254.

QUESTION PRESENTED FOR REVIEW

Did the action of the trial court—after granting counsel for appellants right to inquire of the trial jury panel, on voir dire, concerning the illegal activities of the prospective jurors in the field of gambling—in summarily revoking such right to so inquire; and in refusing and declining to himself inquire respecting such activities, deprive appellants of the right to trial by an impartial jury and to a fair trial under due process of law as provided in Amendments V., and VI., to the Constitution of the United States?

CONSTITUTIONAL PROVISIONS

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be

twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State, and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATUTES

District of Columbia Code, 1951 Edition, Title 11, section 1417: (Mar. 3, 1901, 31 Stat. 1223, ch. 854, section 215; June 29, 1953, 67 Stat. 107, ch. 159, section 408.)

No person shall be competent to act as a juror unless he be a citizen of the United States, a resident of the District of Columbia, over twenty-one years of age, able to read and write, and to understand the English language, and be a good and lawful person, who has never been convicted of a felony or a misdemeanor involving moral turpitude.

RULES OF CRIMINAL PROCEDURE, AS AMENDED, MAY 1, 1956

RULE 24 (a). The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of the prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

STATUTE

District of Columbia Code, 1951 Edition, Title 22, section 1508: (Mar. 3, 1901, 31 Stat. 1331, ch. 854, section 869; May 16, 1908, 35 Stat. 154, ch. 172, section 3; June 29, 1953, 67 Stat. 96, ch. 159, section 206).

> It shall be unlawful for any person, or association of persons, within the District of Columbia, to purchase, possess, own, or acquire, any chance, right, or interest, tangible or intangible, in any policy lottery or any lottery, or to make or place a bet or wager, accept a bet or wager, gamble or make books or pools on the result of any athletic contest. For the purpose of this section, the term "athletic contest" means any of the following, wherever held to to be held; a football, baseball, softball, basketball, hockey, or polo game, or a tennis, golf, or wrestling match, or a tennis or golf tournament, or a prize fight, or boxing match, or a trotting or running race of horses, or a running race of dogs, or any other athletic or sporting event or contest. Any person or association of persons violating this section shall be fined not more than $1,000 or imprisoned not more than one year, or both.

STATEMENT OF THE CASE

Heretofore on March 26, 1957, a Grand Jury of the United States District Court for the District of Columbia, returned an indictment against petitioners charging petitioners with violation of the gaming laws of the District of Columbia and with violation of Title 26—4411 United States Code.

The indictment is as follows:

[Filed in Open Court Mar. 26, 1957]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Impanelled December 27, 1956, Sworn in on January 2, 1957

Criminal No. 307-57

Grand Jury No. 261-57
262-57

Vio. 22 D. C. C. 1501, 1502, 1505 26 U. S. C. 7262

The United States of America

v.

Joseph Robinson
James Gaston

The Grand Jury charges:

Continuously during the period from about January 29, 1957 to about February 1, 1957, within the District of Columbia, Joseph Robinson and James Gaston were concerned as owners, agents and clerks, and in other ways, in managing, carrying on and promoting a lottery known as the numbers game.

SECOND COUNT:

On or about February 1, 1957, within the District of Columbia, Joseph Robinson and James Gaston knowingly had in their possession and under their control notations, records, receipts, tickets, certificates, bills, slips, tokens, papers and writings, current and not current, used and to be used in a lottery known as the numbers game.

THIRD COUNT:

Continuously during the period from about January 29, 1957 to about February 1, 1957, within the District of

Columbia, Joseph Robinson and James Gaston did knowingly, as agents, employees, operators, occupants and otherwise, maintain, aid and permit the maintaining of a gambling premises located at 215 Gallatin Street, Northwest.

FOURTH COUNT:

Continuously during the period from about January 29, 1957 to about February 1, 1957, within the District of Columbia, Joseph Robinson was engaged in the business of accepting wagers without having previously paid the special tax as required by Title 26, United States Code, Section 4411.

FIFTH COUNT:

Continuously during the period from about January 29, 1957 to about February 1, 1957, within the District of Columbia, James Gaston was engaged in the business of accepting wagers without having previously paid the special tax as required by Title 26, United States Code, Section 4411.

/s/ Oliver Gasch
Attorney of the United States in
and for the District of Columbia

A TRUE BILL:

/s/ Daniel L. Harbour
Foreman.

Thereafter upon arraignment there was a plea of not guilty.

There was a trial by jury and verdict and judgment of guilty on each count, and sentence of 1 to 3 years in the penitentiary for each defendant.

Notice of appeal was filed; defendants were permitted to remain at large upon bail.

On the trial of the cause the petitioner Joseph Robinson was represented by Wesley S. Williams, Esquire and defendant James Gaston by T. Emmett McKenzie, Esquire.

The notice of appeal as to each petitioner was filed by Wesley S. Williams; the brief was filed by Wesley S. Williams; the case was submitted upon the brief without argument.

The United States, through its proper District Attorney, on March 25, 1958, filed a counter designation of record as follows:

1. The transcript of the proceedings.
2. This counter-designation.

On May 28, 1958 the following document was filed in the cause: (R. 208)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(Filed May 28, 1958, /s/ Harry M. Hull)

Criminal No. 307-57

UNITED STATES OF AMERICA

v.

JAMES GASTON and
JOSEPH ROBINSON,
Defendants.

ORDER

Upon consideration of the oral motion of the United States by its attorney, the United States Attorney, and pursuant to Rule 75(h), Fed. R. Crim. P.

(* * * if anything material to either party is omitted from the record on appeal by error or accident

• • • the District Court, either before or after the record is transmitted to the appellate court • • • on a proper suggestion or on its own initiative, may direct that the omission • • • shall be corrected, and if necessary that a supplemental record shall be certified and transmitted by the clerk of the District Court. • • •)

It is this 28th day of May, 1958,

ORDERED, that the motion be, and it is hereby, granted;

AND IT IS FURTHER ORDERED that the Clerk of this Court shall certify and transmit to the United States Circuit Court of Appeals for the District of Columbia at the expense of the United States a supplemental record on appeal as follows:

1. Volume 1, pages 1 through 46 of the transcript of proceedings.

/s/ Luther W. Youngdahl
JUDGE

Copy of this order sent this 28th day of May, 1958, to Attorney for defendants, Wesley S. Williams, 620 Fifth Street, N. W. Washington, D. C.

/s/ Walter J. Bonner
Assistant U. S. Attorney.

Thereafter the Judgment of the Court was entered as follows:

FILED JUN 18 1958 Joseph W. Stewart, CLERK

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,400

JAMES GASTON,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court
for the District of Columbia

Before: Fahy and Washington, Circuit Judges, and Hastie, Circuit Judge, United States Court of Appeals for the Third Circuit*.

JUDGMENT

This case came on for consideration on the transcript of the record from the United States District Court for the District of Columbia, and was submitted on the briefs of the parties.

On consideration whereof, it is ORDERED and ADJUDGED by this Court that the judgment of the said District Court appealed from in this cause be, and it is hereby, affirmed.

Per Curiam.
/s/ C. F.
/s/ Z. W.
/s/ W. H.

Dated: June 18 1958

* Sitting by designation pursuant to the provisions of Sec. 291(a), Title 28, U. S. Code.

FILED JUN 18 1958 Joseph W. Stewart, CLERK

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,401

JOSEPH ROBINSON,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court
for the District of Columbia

Before: Fahy and Washington, Circuit Judges, and Hastie, Circuit Judge, United States Court of Appeals for the Third Circuit*.

JUDGMENT

This case came on for consideration on the transcript of the record from the United States District Court for the District of Columbia, and was submitted on the briefs of the parties.

On consideration whereof, it is ORDERED and ADJUDGED by this Court that the judgment of the said District Court appealed from in this cause be, and it is hereby, affirmed.

Dated: June 18 1958

Per Curiam.

/s/ C. F.
/s/ Z. W.
/s/ W. H.

* Sitting by designation pursuant to the provisions of Sec. 291(a), Title 28, U. S. Code.

Thereafter and in due time the petitioners filed through T. Emmett McKenzie, Esq., petition for rehearing.

The United States filed no brief in reply.

On September 4, 1958 the petition was denied as follows:

FILED SEP 4 1958 Joseph W. Stewart, CLERK

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

APRIL Term, 1958

No. 14,400

JAMES GASTON,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

No. 14,401

JOSEPH ROBINSON,
Appellant,

v.

United States of America,
Appellee.

Before: Fahy and Washington, Circuit Judges, and Hastie, Circuit Judge, United States Court of Appeals for the Third Circuit, Sitting by Designation.

ORDER

Upon consideration of appellants' petition for rehearing, it is

ORDERED by the court that the aforesaid petition be, and it is hereby, denied.

Per Curiam.

Dated: September 4 1958

In the petition for a rehearing the petitioners asserted the proposition that the members of the petit jury lacked statutory qualification;

That the Court restricted the right of counsel to examine into qualifications on the voir dire examination;

That the Court declined to adequately inquire into qualifications as a part of its own examination of petit jurors.

In addition petitioners in support of petition for rehearing set forth motion for continuance; motion for change of venue; and motion to require the Court to inquire into the qualifications of the petit jurors and grand jurors who returned the indictment.

These motions read as follows:

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Criminal No. 307-57

UNITED STATES OF AMERICA

v.

JOSEPH ROBINSON

and

JAMES GASTON,

Defendants.

MOTION FOR CONTINUANCE (R. 164-181)

Comes now the defendant, James Gaston, and moves for a continuance of this cause for an indefinite period of not less than a minimum of one (1) year, on the ground that there exists in the District of Columbia so great a prejudice against the defendant and against his constitutional

right to a fair trial under due process of law, that he cannot obtain a fair trial under due process of law free from public bias and prejudice within any time other than that heretofore specified. As further grounds of this motion the defendant alleges as follows:

1. On November 4, 1957, F. B. I., Director, Edgar Hoover, is reported in the local press to have "lashed out against the mounting success of criminal and subversive elements in employing loopholes, technicalities, and delays to defeat the ends of justice".

In the Washington Evening Star this story, in toto, occupied a 4 column head on page 1 of section B.

It was carried in the other metropolitan newspapers.

At this date the actual document is unavailable but defendant will present photostatic copies to the court prior to hearing upon this motion.

2. On November 14, 1957, page 1, 2 columns, Washington Star, declared in part:

MURRAY DECLARES COURTS TEND TO FAVOR CRIMINALS; and also stated Washington Police Chief Robert V. Murray appealed strongly last night for citizens assistance in reversing an alarming trend on the part of Courts to favor the criminal at the expense of society.

The head of Washington's Metropolitan Force appealed for help to the National Association of Citizen's Crime Committee, honoring him at a dinner at the Sheraton Park Hotel.

These remarks were reported in the entire metropolitan press.

3. On November 15, 1957, the Washington Star at page A 25, in two columns reported that the National Association of Citizens Crime Committee scored court decisions tending toward the unjustifiable discharge and release of the guilty.

This report was carried in the entire metropolitan press.

On November 21, 1957, The Washington Post and Times Herald in a screaming headline running the entire space of page 1, said:

"Restrictions Ruin Police War on Gambling, says Lutz".

Lutz, is Deputy Police Chief Clarence H. Lutz; and further appearing on page 1 of said paper on said date, appeared this:

"his (Lutz's) vehement remarks drew a second from United States Attorney Oliver Gasch. The attorney blasted the enfeebling effects he said recent court decisions have had on local law enforcement." See Exhibit "A".

These remarks were duly reported in the remainder of the metropolitan press.

4. On November 23, 1957 Representative Davis, D. Ga., was reported to have stated, Washington Post, page B 1 to have said that Chief Murray's charge there was an alarming trend on the part of the courts to favor the criminal at the expense of society warranted congressional inquiry.

These remarks were reported by the remainder of the metropolitan press.

5. On November 24, 1957 the Washington Post, page B 4 reported that Deputy Chief Lutz and District Attorney Gasch intended to ask Congress to correct "a mechanical rule on time alone" which had been promulgated by the courts in hindrance of efforts to combat crime.

6. On December 19, 1957, Washington Star, page a 23, Deputy Police Chief Edgar E. Scott, likened the "threat" of recent court decisions in several key criminal cases to the dangers of communism.

"Undermining the power of the courts and weaking the prestige of law enforcement agencies are prime targets

for communistic forces operating to overthrow the government", the police executive said. "In this respect, the Mallory decision and other restrictive opinions of the appellate courts are disastrous in their effects upon law enforcement and the clearance of crimes." See defendant's exhibit "B" for a detailed account of this person's hysterical allegations.

On the same date, the Washington Post at page C 15 reports this official as adding the courts have come "perilously close to the point where the rights of the public are given no consideration." Exhibit "C".

7. On December 13, 1957, at page A 29, the Washington Star reported that Lutz had said "My reason for making those statements (supra) was to find out if Washington citizens want the conditions to continue to exist.

"An aroused citizenry can get things moving".

The head of the story is "Lutz had Hoped to Stir Citizens." Exhibit "D".

These references do not encompass each and every remark made by the persons referred to supra and reported in the local press.

The complete file will be available on hearing of this motion.

8. The Washington Post and Times Herald has reported circulation of 390,649 copies; and produces three separate editions, daily.

The Evening Star has reported circulation of 254,992 and produces three separate editions daily.

The Washington Daily News has reported circulation of 178,491 and produces three separate editions daily.

The Washington Edition of the Afro American has reported circulation of 34,000.

9. There are four television stations in this district each reporting news events throughout the day and which operate approximately 20 hours daily.

There are 19 radio stations in the area reporting news events. Some stations are on the air 24 hours per day—others for shorter periods.

10. It is certain that the news coverage of the matters herein referred to above, by press, television and radio has saturated the district with detailed information relative to the subject matter.

11. The complaints are made by law enforcement officials responsible to the District of Columbia government—primarily; and, more importantly by law enforcement officials responsible to the Department of Justice, as part of the executive branch of the federal government; and this department initiates the prosecution and represents the United States in the instant prosecution.

12. This flood of publicity asserts that trials in this district are conducted to favor the aims of communism—to debase the rights of the virtuous segment of socity—to confer immunity upon the criminal element of society—by courts deliberately and wilfully betraying alleged "rights" of the populace.

13. In one aspect it declares its purpose to "stir up" the populace to revolt against such judicial behavior.

14. There has been no forthright charge of misfeasance, malfeasance of non feasance in office; nor any courageous effort to seek relief through impeachment.

All that is asserted is that decisions and opinions which have led to acquittals indicate a judiciary bent upon deprivation of undefined "rights" of the public.

It is not asserted that there was a denial of the constitutional right to fair trial under due process; but it is covertly proposed that due process under constitutional

guarantees is in itself inherently evil; —pro-communistic; —a boon to crime; and a part and parcel of a judicial plan to subvert justice.

15. That such exhortations from persons of the prominence of those mentioned, supra, have no effect upon the public mind and conscience is a tenet which lacks support in toto.

16. The ultimate result has been to bring about a climate of mental confusion—to instill in the minds of jurors and of the citizenry the belief and opinion that in a judicial trial of an indictment in this district truth and justice are found in the testimony and accusations of police and prosecuting attorneys, only; and that efforts of defense counsel, and decisions of courts are technicalities, loopholes, and mechanical trivia utilized by such persons and institutions to defeat and obstruct the true aims of justice.

No fair trial under due process of law can be obtained in a judicial district thus "conditioned" and brain-washed.

17. To quote again from the Washington Post and Times Herald of November 25, 1957, Editorial page:

"Courts subjected to intemperate criticism from policemen and prosecutors who seem to have forgotten that justice and not mere punishment is their essential business. The burden of their complaint is that the courts have been overscrupulous in respecting the rights of defendants as though these were somehow in conflict with the interests of society."

In *Delaney* v. *United States,* C.C.A. 1, 1952, 199 F. 2d 107, 111, 113, the court said in part:

> The newspaper publicity was characterized by flamboyant, front page headlines in large, heavy type, covering colorful feature stories emphasizing the more striking aspects of the testimony. This was

supplemented by radio and television exploitation of the same material. * * *

It is fair to say that, so far as the modern press media of communication could accomplish it, the character of Delaney was pretty thoroughly blackened and discredited as the day approached for his judicial trial on narrowly specified charges.

* * * as stated by Mr. Justice Jackson, concurring in Krulewitch v. United States, 1949, 336 U. S. 440, 453, 69 S. Ct. 716, 723, 93 L. Ed. 790: "The naive assumption that prejudicial effects can be overcome by instruction to the jury, * * * all practicing lawyers know to be unmitigated fiction." * * * One cannot assume that the average juror is so endowed with a sense of detachment, so clear in his introspection perception of his own mental processes, that he may confidently exclude even the unconscious influences of his preconceptions as to probable guilt, engendered by a pervasive pre-trial publicity. * * *

(2) *If all this material had been fed to the press by the prosecuting officials of the Department of Justice,* we think the appellate court would have had to say that the denial of a longer continuance was an abuse of discretion. (Underscoring supplied).

And see, Opinions of Curran, J.; and Tamm, J., in *United States* v. *Carper and Taylor,* 836, 52.

Wherefore, the premises considered, defendant prays that he be granted a continuance in this cause to a date not preceeding the fifteenth day of January, 1959.

Respectfully submitted,

/s/ T. Emmett McKenzie,
Counsel for defendant Gaston.

Service acknowledged for the United States of America this 7 day of January, 1958.

/s/ Oliver Gasch

MOTION FOR CHANGE OF VENUE (R. 164-181)

Comes now the defendant, James Gaston, through counsel, and moves the Court for an Order transferring this cause from the United States District Court for the District of Columbia to another United States District Court on the ground that there exists in the District of Columbia so great a prejudice to the defendant and so great a prejudice against his right to a fair trial under due process of law that he cannot obtain a fair and impartial trial in this District.

In support of this motion the defendant invites the attention of the Court to the points and authorities attached to and made part of his motion for continuance; all of which are incorporated herein by reference.

Respectfully submitted,

/s/ T. Emmett McKenzie,
Century Building
Counsel for Defendant Gaston.

Service acknowledged this 7 day of January, 1958.

.....
U.S. District Attorney.

MOTION TO REQUIRE THE COURT TO INQUIRE INTO THE QUALIFICATIONS OF THE PRESENT PETIT JURORS AND INTO THE QUALIFICATIONS OF THE GRAND JURORS WHO RETURNED THE INSTANT INDICTMENT (R. 185-206)

Comes now the defendant James Gaston, through Counsel, and in support of his motion alleges as follows:

1. Title 11, Section 1417, District of Columbia Code states that no person shall be competent to act as a juror unless he meets certain requirements one of which is that the juror must be "a good and lawful person."

2. The Jury Commission for the District of Columbia and the District Court each utilize a printed questionaire to elicit information from prospective jurors. This document requires that each prospective juror state whether he has been arrested or convicted of a crime, but does not inquire further into possible criminal activities.

3. On Sunday, January 5, 1958, the Metropolitan Daily paper carried a dispatch quoting Deputy Police Chief Clarence H. Lutz asserting that "Half of Washington Gambles. That's the estimate of Deputy Police Chief Clarence H. Lutz, and he ought to know. Lutz is head of the Metropolitan Police Department's Morals Division."

There is no reason to doubt the substantial accuracy of the conclusions reached by this emminent authority who has commanded the Morals Division since 1951.

4. Title 22, Section 1508, District of Columbia Code, 1951 Edition, provides that it shall be unlawful for any person to purchase, possess, own or acquire, any chance in a lottery or to make or place a bet or wager.

5. A person who violates Title 22, Section 1508 is not a good and lawful person as required by the Code and his moral right to serve as a juror is qualified by his actual character and not by his success in being able to avoid detection in flagrante delicto with attendant conviction.

6. It must be accepted, per Deputy Chief Lutz's estimate, that at least one half of the jurors both grand and petit who have been or who are about to become concerned with this cause are not qualified to serve as jurors. It is certain that no proper and adequate effort was made to determine whether or not they were engaged in criminal activity, and the defendant is entitled to knowledge of their status in that respect.

To require the defendant to delve into this matter on his voir dire examination would subject him to the hos-

tility of the entire panel because of his effrontery in probing, publicly, into such activities; and further, the jurors would have the right to decline to answer such a question under such circumstances under the right granted them by the Fifth Amendment to the Constitution of the United States against self incrimination.

7. Further, it is exceedingly doubtful that jurors who are bettors are capable of affording an alleged gambler a fair and impartial trial free from bias and prejudice; for the disgruntled losers, eager as they may be to place a wager, nevertheless consistently nourish a feeling of resentment against the bookie who has won their funds.

WHEREFORE, the promises considered, the defendant prays that this cause be held in abeyance until

1. A proper judicial inquiry is made to determine whether any of the persons on the aforesaid Grand Jury are guilty of any of the offenses proscribed in Section 22-1508 supra, and

2. Whether any of the members of the present Petit Jury panel are persons guilty of acts prescribed by said section of the Code, and

3. That no such persons be permitted to be concerned in any manner as jurors in this cause.

/s/ T. Emmett McKenzie
The Century Building,
412 Fifth Street, N. W.,
Washington 1, D. C.
Counsel for Defendant Gaston.

Service Acknowledged For The
United States of America, this
9th day of January, 1958

/s/ Oliver Gasch
United States Attorney for the
District of Columbia.

The appeal from the judgment of the trial Court was submitted upon brief and without argument. This brief did not touch upon the matters raised in the petition for rehearing, but it is significant to note, supra, that the counter-designation of record deals solely and entirely with the propositions advanced in support of the petition for a rehearing in volume 2 of the transcript requested by the District Attorney. This volume of the transcript was introduced into the case pursuant to oral motion of the United States Attorney who alleged such transcript was material to the record on appeal. See Order of May 28, 1958, supra.

Since the judgment below affirming the conviction in the trial Court was by Per Curiam and since it recites nothing other than affirmance of the judgment of the Trial Court it is not known whether the Court of Appeals below considered the matters called to its attention by the United States District Attorney; and since the Order denying the petition for rehearing is a Per Curiam Order reciting nothing further than a denial of the motion it cannot be known why the petition for rehearing was denied.

However it is certain that the Circuit Court of Appeals had nothing to say, nor any opinion to express, relative to the denial of trial by a fair and impartial jury; and the testimony and evidence respecting that phase of the trial was before the said Court at all times, per demand of the United States Attorney.

Silence on a question of such importance involving constitutional rights seems to be undesirable.

Citizens, and courts of first jurisdiction, are entitled to, and need, opinions from appellate courts respecting such matters; and appellants urge this court to settle this legal proposition.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

The Circuit Court of Appeals below has departed from the accepted and usual course of judicial proceedings and has so far sanctioned such a departure by a lower Court, as to call for an exercise of this Court's power of supervision.

The Circuit Court below has decided an important question of Federal Law which has not been, but should be settled by this Court.

Counsel for petitioners does not know how to separate the legal authorities upon which he depends with respect to reasons relied upon for allowance of writ and he submits the said authorities as being pertinent to the entire question. As a prelude counsel cites the case of *Turner* v. *State*, 157 S.W., 67, 68, 128 Tenn. 27, Ann. Cas. 1914D 693, where in a case involving the very principal raised by appellants below and which case has not been reversed it was said:

> Criminal Action for violation of state liquor laws.—During selection of the jury it developed that one juror believed the liquor law should be enforced in rural sections but not in the city. The court then interrogated and decided the juror was qualified notwithstanding objection of the defendant.
>
> The question to be determined, is whether the juror was competent. This must be settled in accordance with the following principles:
>
> Our forms of impanelment, both of grand and petit jurors, recites that the jurors be "good and lawful men." *This is no unmeaning phrase.* (Emphasis by Court). It comes to us from remote times, as far back as the statute of 3 Hen. VIII, ch. 12. That statute in terms applied to grand juries, but was also construed to cover the case of trial juries as

well. 2 Hist. P.C. 156, 265; 5 Bac. Abridge 313. It has also been recognized and repeated in our statutes and decisions. Shan. Code, sec. 5804; Neely v. State, 4 Baxt. (Tenn.) 180; Knights of Pythias v. Steele, 107 Tenn. 1 and 14, 63 S.W. 1126; (30) Griffith v. Wilson, 101 Tenn. 612, 49 S.W. 736. At the common law the phrase was "liberi et legales homines." The word "liberi" in strictness imported freeholders' but it was said: "Liber homo is not only one who hath freehold land, but that hath freedom of mind, and stands indifferently, no more inclining to the one than the other." 5 Bac. Abridg. 348. Again: "According to the rule expressed in the English of those days: 'He ne es othes worthe that es enes gylty of oth broken.'. Bracton, lib. 10, tr. 1, ch. 19". The same thought is expressed in our statutes, in the description of jurors, as men "esteemed in the community for their integrity, fair character, and sound judgment." Shan. Code, sec. 5801. Such only are to be appointed for service in court, and so great is the solicitude which the law feels on this subject that it is further provided that in case the authority vested with the power of appointment shall fail to make the appointment or those nominated fail to attend, "the court shall designate *other good and lawful men* (emphasis by Court) and direct the sheriff to summon them as jurors," section 5804, and that the sheriff in summoning such jurors shall be guided by the same principle (section 5810) and to make even more fully secure the high character of the jury, when finally constituted as a tribunal for the trial of rights, it is provided that the judge presiding may discharge from service any juror who does not possess the requisite qualifications and may discharge him "for any other reasonable or proper cause, (section 5818). The juror should be as impartial as the judge himself.

These are the requirements of the common law, as well as of our modern statutes and decisions, and by our constitution the duty is imposed on this Court, and upon all of the judges of the State, to see to it that trial by jury shall remain inviolate (Const. art. 1, sec. 6) and that men shall be tried by impartial juries, (Id. art. 1, sec. 9). It has been often held

that the constitution means that the right of trial by jury shall be maintained in its purity and integrity as at common law. We have seen what the common law requires; also that our statutes and decisions require the same.

Now is a man who made on his voir dire answers such as Sullivan made a "good and lawful man", an impartial man, and a good citizen? We say "No". *He believes* according to his replies, *that as to the special crime charged in the indictment* the law should be enforced in Shelby County outside of Memphis, but not in Memphis, which is saying, in other words, that he believes *in an unequal and partial enforcement of the law, favoring one portion of the people of his county, and discriminating against another portion.* (emphasis by counsel) Such a man has not the qualifications of impartiality which the common law and our statutes demand, and is not competent to sit on a case involving the crime as to which he confesses such principles of conduct.

In the Federal Courts, *Bailey* v. *United States*, 53 F. 2d 982, 983, 984—C.CA 5; 1931; not reversed, held as follows:

(204) * * * It would be promotive of the fairness of the trial for the accused and their counsel to have further opportunities than, in the circumstances disclosed, was afforded by the answers to the statutory questions, to discover the state of mind of prospective jurors in regard to the issues to be tried, whether they were indifferent between the parties, or were biased or prejudiced as to result of their relations to adversaries of the accused in the trial, or of their membership in an organization engaged in promoting the enforcement of criminal laws charged to have been violated by the accused, or of their having opinions as to the guilt or innocence of the accused based upon reading newspaper accounts of previous trials of the accused or their alleged associated on similar charges. The answers of prospective jurors as to such matters, which might have the effect of unduly influencing them, and their manner and demeanor

while under examination, would do no more than furnish such evidence of their associations or connections and of their state of mind with reference to the issues to be passed on as the accused and their counsel, in the circumstances disclosed, reasonably might ask to have the benefit of and be enabled to exercise intelligently the right of challenge, either for cause or peremptory. * * * the appearance or demeanor of prospective jurors while under examination, might be expected to furnish some information or make impressions which reasonably might influence the accused or their counsel in exercising the right of peremptory challenge. That right is one of the most important of the rights secured to the accused. It should not be required to be exercised before an opportunity is given for such inspection and examination of prospective jurors as is reasonably necessary to enable the accused to have some information upon which to base an exercise of that right. Lewis v. United States, 146 U.S. 370, 378, 13 S. Ct. 136, 36 L. Ed. 1011; Pointer v. United States, 151 U.S. 396, 408, 14 S. Ct. 410, 38 L. Ed. 208; * * *. *We are of the opinion that, in the circumstances attending the making of the request that prospective jurors be asked additional questions, the court's summary disposition of that request amounted to a failure of the court to exercise its discretion in the matter of examining jurors on to voir dire as to the existence of a disqualifying state of mind.* Aldridge v. United States, 283 U.S. 308, 51 S. Ct. 470, 75 L. Ed. 1054, 73 A. L. R. 1203; Neal v. United States, (CCA) 22 F. 2d 52, and had the effect of depriving the accused of a fair opportunity to exercise intelligently their right of peremptory challenge. (emphasis by counsel).

In *United States* v. *Chapman* 158 F.2d 417, 419-C.C.A 10; 1947, it was held:

(5) * * * Suitors (are) entitled to a fair and impartial trial before a jury of 12 impartial and unbiased jurors. Impartiality in the sense that we use it is not a technical conception. It is a state of mind or mental attitude, for the determination of which there is no fixed formula. United States v. Wood,

299 U.S. 123, 57 S. Ct. 177, 187, 81 L. ed. 78; Baker v. Hudspeth 10 Civ. 129 F 2d. 779. Whether a juror is prejudiced or partial in the sense that one of the parties is denied a fair and impartial trial, is not a procedural matter to be determined by statutory construction. It is one of vital substantive law under the Constitution, to be resolved according to the highest standards of human conduct. It is a question first addressed to the good sense of the trial judge, subject to review under the supervisory power inherent in appellate jurisdiction. Cf. McNabb v. United States 318 U.S. 332, 63 S. Ct. 608, 87 L. ed. 819. Thiel v. Southern Pacific Co. 66 S. Ct. 984.

In *Baker* v. *Hudspeth*, 129 F 2d. 779, 782; the Circuit Court said:

(3,4) * * * "Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests, and procedure is not chained to any ancient and artificial formula." United States v. Wood, 229 U.S. 123, 145, 57 S. Ct. 177, 185, 81 L. Ed. 78. But, deeply imbedded in the right to a fair and impartial trial is the requirement that the jury of twelve men, chosen to sit in judgment, shall have no fixed opinion concerning the guilt or innocence of the one on trial and that their ultimate verdict shall be based upon the facts as they are submitted to them by the Court, under its instructions and superintendence. Anything less is a farce and a travesty upon justice.

In *United States* v. *Wood*, 299 U.S. 12357 S. Ct. 177 181, L. ed. 78, 81, 82, this Court said in part:

First—the Sixth Amendment requires that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. The Amendment prescribes no specific tests. The bias of a prospective juror may be actual or implied; that is, it may be bias in fact or bias conclusively presumed as matter of law. There is no ground for a contention—and we do not find that such a contention is made—that Congress has undertaken to

> preclude the ascertainment of actual bias. All persons otherwise qualified for jury service are subject to examination as to actual bias. All the resources of appropriate judicial inquiry remain available in this instance as in others to ascertain whether a prospective juror, although not exempted from service, has any bias in fact which would prevent his serving as an impartial juror. In dealing with an employee of the Government, the court would properly be solicitous to discover whether in view of the nature or circumstances of his employment, or of the relation of the particular governmental activity to the matters involved in the prosecution, or otherwise, he had actual bias, and, if he had, to disqualify him. * * *.

As the Court will recall in the Wood case, supra, it was contended that bias must be implied where in a prosecution brought in the name of the United States, employees of the United States are called to sit as jurors and a solicitous investigation into the bias on that score was commanded.

How much more so is such an inquiry required where the prospective juror admits that he or she has been guilty of an offense against the very statute defendant is charged with having violated; albeit the sections violated are different parts of the entire statute?

Where the prospective juror admits, open and habitual violation of the statute involved, see D.C. Code, Title 22-1508, supra; and where the qualification of the juror requires that he be "a good and lawful person," upon what legal basis can a Judge of a United States Court forbid an inquiry into the mental and moral ramification of such conduct?

And where, as happened in this cause, the trial Judge recognizing the problem gives defense counsel the right to inquire into the matter until it having developed 85 to 90% of the panel are violators of the law under consideration he concludes that further inquiry would most

certainly demonstrate further lack of qualification, what has happened to the right in the defendant to establish grounds for challenge for cause?

The admission by a juror, of conduct as set forth supra, invites prompt, inquiry as follows:

Has the juror's gambling experience resulted in suffering substantial financial losses?

And have such losses brought in their wake such financial disaster as loss of property due to failure to promptly discharge notes and similar obligations?

Has the juror formed an opinion that all gamblers, i. e., those who accept wagers are crooked?

Has the juror formed an opinion that since gamblers accepting wagers operate on a favorable percentage basis where the odds are always against the player in amounts up to 1000 to 1, such persons are not entitled to a fair trial?

The field properly opened to inquiry is, of course, much more extensive.

To again rely upon a legal opinion, non-Federal it is interesting to note that in *State* v. *Pickett*, 73 N.W. 346, 347; Supreme Court of Iowa, 1897, that Court held as follows:

> • • • The right given to challenge for any of the causes named, and to examine the juror, or other witnesses, in support of the challenge, precludes the conclusion that the law assumes to present none but competent jurors, or that a party has a right to so assume. The right to examine for such cause would be an idle provision, if such were the law. The states makes no guaranty of the competency of jurors, but says to litigants, "Examine for yourselves".

In Aldridge v United States, 283 U.S. 308, 51 S. Ct. 470, 75 L. ed. 1054, 1057, this Court said:

> The right to examine jurors on the voir dire as to the existence of a disqualifying state of mind, has been upheld with respect to other races than the black race, and in relation to religious and other prejudices of a serious character. Potter v State, 86 Tex. Crim. Rep. 380, 384, 216 S.W. 886; People v Reyes, 5 Cal. 347, 349; Watson v Whitney, 23 Cal. 375, 379; People v Car Soy, 57 Cal. 102; Horst v Silverman, 20 Wash. 233, 234, 72 Am. St. Rep. 97, 55 Pac. 52. * * *.

When, then, as in this cause, the initial examination on voir dire reveals a condition which puts both court, counsel and defendant upon notice that lack of qualification, or bias or prejudice, or all of these must be considered as a matter of practicality as being inherent in the mental attitudes of the prospective jurors, what happens to the defendants' constitutional right when examination designed to ascertain—as matter of fact and of law—such lack of qualification is by the court, sua sponte, cut off in limine?

On another occasion this Court, in Reynolds v United States, 98 U.S. 145, 154, 155, 25 L. ed. 245, said of the same principle:

> By the Constitution of the United States (Amend. VI.), the accused was entitled to a trial by an impartial jury. A juror to be impartial must, to use the language of Lord Coke, "be indifferent as he stands unsworn." Co. Litt. 155 b. Lord Coke also says that a principal cause of challenge is "so called because, if it be found true, it standeth sufficient of itself, without leaving anything to the conscience or discretion of the triers" (id. 156 b); or, as stated in Bacon's Abridgement, "it is grounded on such a manifest presumption of partiality, that, if found to be true, it unquestionably sets aside the * * * juror." Bac. Abr. tit. Juries, E, 1. "If the truth of the matter alleged is admitted, the law pronounces the judgment; but if denied, it must be made out by proof to the satisfaction of the court or the triers." Bac. Abr. Tit. Juries, E. 12. To make out the existence of the fact, the juror who is challenged may be examined on his voir dire, and

asked any questions that do not tend to his infamy or disgrace.

CONCLUSION

Petitioners contend that an appraisal of the facts established by the record in the light of the opinions of this Court touching upon the matter now brought to the Court's attention; and in the light of the opinions of other Circuit Courts of appeal cited; and of opinions of State Supreme Courts, cited, demonstrate an urgent need for guidance by the highest court in the land.

There should be no doubt, nor division of opinion, nor clash of federal judicial authority respecting this question:

> May the defendant fully inquire into admitted criminal activities, by jurors, whose deliberation as to guilt or innocence, it is proposed to utilize as the major factor in a fair trial by an impartial jury, under due process of law?

Respectfully submitted,

/s/ T. Emmett McKenzie

T. Emmett McKenzie,
412 Fifth Street, N.W.
Washington 1, D. C.
Counsel for Petitioners